UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

RITE AID OF NEW YORK, INC., AND RITE AID OF NEW JERSEY, INC., Respondents, -and- 1199SEIU UNITED HEALTHCARE WORKERS EAST, Union.	Case No. 02-CA-160384

RESPONDENTS' REPLY BRIEF IN OPPOSITION TO THE COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF

On March 31, 2017, Counsel for the General Counsel filed an Answering Brief to the Exceptions filed by Rite Aid of New York, Inc. and Rite Aid of New Jersey, Inc. (collectively "Rite Aid"). This Reply Brief addresses relevant portions of that Answering Brief.[1]

I. Introduction

Counsel for the General Counsel spends 49 pages painstakingly recounting Allyson Belovin's testimony in abundant detail, recounting a tainted view of the bargaining history between Rite Aid and the Union in an attempt to establish that Rite Aid's transfer of bargaining unit work proposal ("the Proposal") was a sham and presented as an ultimatum that prevented good faith bargaining. To the contrary, the Record and Board law demonstrate that Rite Aid

[1] Regarding duplicative arguments contained in both 1199SEIU United Healthcare Workers East (the "Union") and the Counsel for the General Counsel's Answering Briefs, Rite Aid responds to those duplicative arguments in its Reply Brief to the Union's Answering Brief.

went to great lengths to reach an agreement with the Union while also addressing Rite Aid's economic and management needs. To penalize this behavior would be to encourage litigation and impasse over good faith bargaining.

II. Rite Aid Did Not Violate the Act By Engaging in Hard Bargaining Over the Transfer of Bargaining Unit Work

The Counsel for the General Counsel argues that Rite Aid insisted to impasse on a permissive subject of bargaining by presenting the Proposal as an ultimatum. According to the Counsel for the General Counsel, despite admitting that no overall impasse was reached, Rite Aid committed an unfair labor practice by conditioning an agreement on the Union's acceptance of the Proposal. In its Brief in Support of Exceptions to the Decision of the Administrative Law Judge, and in its Reply Brief In Opposition to the Union's Answering Brief, Rite Aid proves that Rite Aid never presented the Proposal as an ultimatum, but instead bargained hard. Rite Aid only conditioned an agreement on an offset to the cost of the 1199SEIU National Benefit Fund ("NBF"). The Union's refusal to provide an acceptable alternative proposal left Rite Aid with no choice but to continue to present the Proposal as a compromise. However, even assuming, as the Counsel for the General Counsel does, that Rite Aid did insist on the inclusion of the Proposal, that alone is not an unfair labor practice.

The Counsel for the General Counsel cites *District 50, United Mine Workers of America*, as an instance where an employer violated the National Labor Relations Act (the "Act") by insisting on a permissive subject of bargaining even where no overall impasse was explicitly declared. 142 NLRB 903 (1969). Yet the Board in *District 50* held that the employer violated the Act because its insistence on the permissive proposal meant that "good faith bargaining never [got] started." *Id*. at 939. Here, good faith bargaining "got started", as the Counsel for the General Counsel admits. On the first day of the hearing before Administrative Law Judge Davis (the

"ALJ"), the Counsel for the General Counsel noted that "bargaining continues" and no overall impasse existed. (Tr. 32). Even after Rite Aid proposed the Proposal, and after the Union rejected it, the Parties reached agreement on a range of topics. (ALJD. 10:34-43). The Proposal did not impede an agreement.

The Counsel for the General Counsel also relies on *Smurfit-Stone Container*, where the employer committed an unfair labor practice by explicitly conditioning an agreement on a permissive subject of bargaining, even where the Parties continued to negotiate. 357 NLRB 1732 (2011). But, as the Counsel for the General Counsel points out, the employer violated the Act in that case by presenting a last, best, and final offer containing a permissive subject of bargaining previously rejected. That did not occur here. Also, even assuming Rite Aid did condition a contract on the Proposal, which it did not, Rite Aid did so in a good faith effort to reach an agreement, and in the face of the Union's failure to compromise or offer alternative proposals to offset the cost of the NBF. Rite Aid's actions did not result in impasse and good faith bargaining continued for over 17 negotiation sessions. Good faith bargaining is not facilitated by outlawing Rite Aid's actions. To the extent reliance on *Smurfit-Stone* finds Rite Aid's behavior is an unfair labor practice, *Smurfit-Stone* should be overruled.

III. Rite Aid's Proposal is Not a Sham

The Counsel for the General Counsel spends significant time trying to support the ALJ's interpretation of *Bridgeport and Port Jefferson Steamboat*, 313 NLRB 542 (1993). *Bridgeport* is different, according to the Counsel for the General Counsel, because "there were no supervisors on the ships", so the employer's proposal to turn bargaining unit associates into supervisors was not a sham. In contrast, the Counsel for the General Counsel claims, Rite Aid already has supervisors in its pharmacies. The ALJ heard undisputed evidence that this is false. At Rite Aid's

New York pharmacies, no supervisor is present for approximately half the time due to the shift schedules of pharmacy managers. (Tr. 163-164). The ALJ heard testimony that this arrangement "could be very disruptive to the pharmacy's workflow", particularly in light of the changing nature of the pharmacy industry with its increased need for supervision and management by pharmacists. (ALJD. 3). The Counsel for the General Counsel, and the ALJ, ignores this evidence.

The Counsel for the General Counsel also claims the Proposal was insincere because interns would not perform supervisory duties. Notably, the Counsel for the General Counsel cites no support in the Record for this claim. Rite Aid modeled its proposal on the bargaining unit structure of New Jersey, where neither staff pharmacists nor interns were part of the bargaining unit. (ALJD. 3). The Union simply never asked about the job responsibilities of interns. The Counsel for the General Counsel assumes interns would perform the same functions as before, but in truth, the subject never came up at bargaining because the Union refused to discuss it and bargain over Rite Aid's proposal.

The Counsel for the General Counsel then makes the inexplicable argument that Rite Aid's need for supervisors was speculative because the Proposal did not go into effect immediately, but only applied to future staff pharmacists. The Counsel for the General Counsel assumes that the gradual turnover rate of Rite Aid's associates would delay the Proposal for years, or even decades. Therefore, the need for additional supervisors was not as pressing as Rite Aid claimed. Nothing supports the Counsel for the General Counsel's assertion. First, this assumption about turnover rates has no basis in the Record, and the Counsel for the General Counsel cites to no evidence regarding the timing or immediate impact of the Proposal. Second, even assuming the Counsel for the General Counsel is correct, the delay actually demonstrates Rite Aid's attempt to compromise and bargain in good faith with the Union. Rather than immediately throw all

associates out of the bargaining unit, as the Counsel for the General Counsel apparently concedes Rite Aid should have done, Rite Aid sought to accommodate the current, bargaining unit staff pharmacists and interns by keeping them in their current positions. Accepting the Counsel for the General Counsel's argument punishes Rite Aid for attempting to address the concerns of its bargaining unit associates and the Union alongside its business needs. Put another way, the Counsel for the General Counsel wants to punish Rite Aid for engaging in good faith bargaining.

Rite Aid tried to accommodate the Union's demand for a $35 million increase in health benefits. Rite Aid did so by bargaining in good faith over a proposal to transfer bargaining unit work, in such a way as to not immediately disrupt the positions of bargaining unit associates. Rite Aid did not insist on the Proposal, it insisted on a cost offset to the NBF. The Union failed to provide one. This dispute did not prevent the Parties from bargaining over other issues in furtherance of an overall deal, and the Board should not find that Rite Aid engaged in bad faith bargaining.

IV. Conclusion

As described above and in Respondents' Brief in Support of Their Exceptions to the Decision of the Administrative Law Judge, the Board should reverse the ALJ's Decision and dismiss the Complaint.

Dated: April 14, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by electronic mail on this 14th day of April, 2017 to the following:

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